of the complaint is that the scope of the bargaining went outside the province of those matters within the legitimate interest of the bargainers and into forbidden territory.

In the absence of any possible charge of unfair labor practice that could have been brought to correct the inclusion of the complained-of clause in the contracts entered into by Ford and the Union, and in the situation that the National Labor Relations Board has not even the authority of the Adjustment Board under the Railway Labor Act to pass on the interpretation and application of collective contracts, the present case presents a much stronger case for judicial intervention than was presented in Steele v. L. & N., 323 U. S. 192; Tunstall v. Brotherhood, 323 U. S. 210; Graham v. Brotherhood, 338 U. S. 232, or similar decisions in which this Court said:

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . . For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected." (Steele v. L. & N., 323 U. S. 192, 207.)

IV. The Other Reasons Cited by Petitioners Are Not of Such Character as to Justify the Granting of Certiorari.

Both Ford and the Union refer to decisions of the War Labor Board recommending similar contract provisions as a compelling reason for the Court to grant certiorari to resolve such conflict. The rules of this Court would not indicate that such a situation is of the special nature and importance to persuade it to grant review. In any event the particular provision in the petitioners' contracts was not the product of the War Labor Board.

That a conflict may exist between the decision of the Court of Appeals herein and those of another circuit Court of appeals or of state courts of last resort might ordinarily weigh heavily in favor of granting certiorari. However, where the decision below is bottomed solidly on a clear cut line of decisions of this Court, such apparent conflicts appear of no importance. The question in the present case is not one of a decision so in conflict with others that needs the intervention of this Court to resolve the conflict. The question has already been resolved, and by this Court. There is no conflicting decision of the Circuit Court of Appeals.

Further it should be said that an examination of the cases cited as being in conflict does not confirm that any exists. None are directly in conflict save perhaps Hartley v. Brotherhood (1938), 283 Mich. 201, 277 N. W. 885. That case was relied upon by the employer (L. & N.) in the Court's consideration of Steele v.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the separate petitioners' Petitions for Writs of Certiorari.

QUESTION PRESENTED.

Whether a provision in a collective bargaining agreement which grants an artificial seniority status to World War II veterans—by dating back their date of employment to include credit for the period of the employee's military service—where the employee *first* became an employee of the employer *after* being discharged from military service—is invalid as being an improper discrimination because it is not based upon any difference relevant to the employer-employee relationship.

STATUTES INVOLVED.

The pertinent statutory provisions appear in Appendix A, *infra*.

STATEMENT.

The statements contained in the respective petitions for writs of certiorari herein correctly state the factual background of this case, and are accepted as so doing. It may serve to point up the basic issue in this case by adding a single paragraph in the interest of clarity.

ONLY BECAUSE OF THE ATTACKED CONTRACT PROVISION, EMPLOYEES WHO ENTERED FORD'S EMPLOY IN 1945 AND 1946 ARE RETAINED IN THE CASE OF LAYOFFS OVER HUFFMAN, WHO ENTERED INTO FORD'S EMPLOY IN 1943.

ARGUMENT.

Certiorari is sought herein upon grounds that study would indicate to be non-existent. An attempt is made to make out a case for the granting of certiorari by presenting the decision below as one which if allowed to stand would result in a financial disaster of the first order. A number of lesser reasons for the Court to grant certiorari are also advanced; some being divided and subdivided.

Rather than belabor each and every ground advanced in categorical order, it would appear desirable to discuss these multitudinous grounds under three principal heads in terms of whether or not the issues of this case are such as meet the critéria established by the Court in its rules and decisions as warranting the granting of a review on writ of certiorari.

The three principal heads under which the ensuing argument will discuss the propriety of certiorari herein are:

I. Is this cause of such magnitude in terms of large amounts of money and the great number of individuals, employees and labor or-

ganizations involved or affected by the decision below such as should persuade the Court to review?

II. Did the Court of Appeals decide an important question of federal law which has not been, but should be settled by this Court; or has decided a federal question in such a way as to conflict with applicable decisions of this Court?

III. Does the decision below circumvent or invade the jurisdiction of the National Labor Relations Board?

The answer to these questions in each instance is believed to be a clear and unmistakable "NO." Accordingly, it is believed that no sound ground exists for the Court to grant the review sought.

I. This Cause Is Not of Such Magnitude as Should Persuade the Court to Grant Certiorari on That Ground Alone.

The petitions sketch a picture of the staggering import of this case in terms of the number of other employees, employers, unions and collective contracts which may be affected by the decision below being permitted to stand. Unfortunately, the materials with which this gloomy picture is drawn are not a matter of record herein.

Peculiarly enough, both Ford and the Union in argument below (in the District Court *and* in the Court

of Appeals) decried the importance of the case. Various figures ranging from a handful to a maximum of a hundred or so individuals were projected as the sum total of those damaged by the complained-of contract provision.

Strangely enough in the six years and more that similar contract provisions are cited as having been in effect, there has been no flood of litigation. The picture drawn by petitioners of stark economic chaos, of a probable stampede by large numbers of litigants into the courts, does not appear to be too correct a delineation. The evidence to hand does not indicate that the decision below is of any such import.

This proceeding was decided in the District Court on the motions for summary judgment. The allegations of fact in the original complaint were all that the District Court and the Court of Appeals had to consider. The injection of issues, foreign to the printed record, of the great economic import of this case after the decisions below does not appear timely or proper.

In the state of the record in the present case, no reason for the granting of certiorari because of the special and important nature of the case would appear to have anything to back it up excepting the choice language of the authors of the petitions for certiorari. Petitioners have not succeeded in presenting a case of great magnitude as disclosed by the record. Rather, the Court is offered a most able manification.

The great stress laid upon the alleged magnitude of the possible evolvements from this decision when

coupled with the lack of other arguments of any real validity amount to a confession by petitioners that the decision below is correct and authorized. "This-decision-is-correct-but-see-where-it-might-lead" is a familiar argument, but when first raised before this Court, cannot but be suspect. The passage of six years with this provision in effect free from any flood-tide of litigation would indicate that the foundation of the republic will be able to bear up under the shock of the decision below.

II. The Court of Appeals Did Not Decide Any Important Question of Federal Law Not Already Decided by This Court, Nor Does Its Decision Conflict With Applicable Decision of This Court.

The decision of the Court of Appeals is grounded upon this Court's decision in Steele v. L. & N. R. Co., 323 U. S. 192, in particular, and upon a line of decisions of this Court represented by Tunstall v. Brotherhood, 323 U. S. 210; Wallace Corporation v. N. L. R. B., 323 U. S. 248; Graham v. Brotherhood, 338 U. S. 232, and Brotherhood v. Howard, —— U. S. ——, 96 L. Ed. 917.

The Court of Appeals specifically applied the test laid down by this Court in the Steele case, and said so (R. 37). Upon the authority of the Steele case, that court found that the preferential seniority given some employees—

> ". . . . under a contract provision which has no relevance to terms and conditions of work or the

> normal and usual subjects of contracts between union and employer." (R. 37)

was discriminatory and the contract was held invalid. After citing at length the test laid down by this Court in Steele v. L. & N., *supra*, 203, the Court of Appeals went on to say (R. 37-38) that:

> ". . . we are cited to no case which approves the creation of seniority rights in a collective bargaining contract upon the basis of acts done or service rendered prior to entering upon the employment in which the seniority is claimed . . . ."

Petitioners cite as an applicable decision of this Court, with which the decision below conflicts, the case of Aeronautical Industrial District Lodge v. Campbell, 337 U. S. 521. The Court of Appeals examined that case (R. 35) and said:

> "We see nothing in this ruling which validates contracts made without regard for the protection of the interests of all members of the Union."

The Court of Appeals carefully examined and considered the applicability of Aeronautical Lodge v. Campbell and quoted the basis of that decision which distinguished it from the present case. It is pointed out that the contract in Aeronautical Lodge v. Campbell gave priority in layoffs to union officials over other employees. The validity of this provision was sustained by this Court on the ground that the gain in continuity of administration of the union due to the retention of these officials in case of layoff was a benefit to the entire membership.

Petitioners also urge that the decision below conflicts with Steele v. L. & N., *supra*. This is advanced in spite of the fact that the decision is most exactly grounded on the Steele case. The conflict asserted by petitioners is that the Steele case recognized that Congress has clothed the bargaining representative "with powers comparable to those possessed by a legislative body both to create and restrict the rights of those it represents" (323 U. S. at p. 202). This it appears authorizes a labor organization to "legislate." If Congress can do it, the Union can. Therefore they contend that the provision for seniority credit is authorized by the Steele case. At least this is the gist of what both Ford and the Union say.

The Steele case is authority for no such proposition. The legislative analogy is quoted from J. I. Case v. N. L. R. B., 321 U. S. 335, and is one of several comparisons used to throw light upon the true nature and status of a collective bargaining representative. One of the comparisons so used is to a public commission with rate making powers, to fix tariffs, etc. If the petitioners would accept the obvious, that is that there has been no delegation of general legislative power, but rather something closer to the rule and regulation making authority of a public administrative body, the fallacy of contending that bargaining representatives have a general legislative power which extends to subjects outside the realm of the employer-employee relationship would of necessity be abandoned.

The decision itself is completely convincing that the Court of Appeals decided a question which has already

been before this Court a number of times. The decision is solidly based on this Court's prior decisions and is in complete harmony with them. The argument for the granting of certiorari on such grounds fail utterly.

III. The Decision Below Does Not Invade or Circumvent the Jurisdiction of the National Labor Relations Board.

Two classes of proceedings engage the attention and are the concern of the National Labor Relations Board: (1) matters concerning the designation and selecting of collective bargaining representatives, and (2) unfair labor practices.

If the negotiation and implementation of the complained-of contract clause could be attacked as an unfair labor practice, it might very well be that the exclusive jurisdiction of the Labor Board to remedy unfair labor practices has been invaded or circumvented. However, the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 151, *et seq.*) spells out in Section 8 thereof (29 U. S. C., Sec. 158) what are unfair labor practices. The breach of duty of the bargaining representative in negotiating and implementing the invalid contract provision is not made the subject of any one of the charges of unfair labor practice set out in the Act.

The Labor Management Relations Act, 1947 was not intended and does not pretend to be the complete body of the law pertaining to labor relations. In at least one respect which is important here it does not

go as far as the Railway Labor Act (45 U. S. C., Sec. 151, *et seq.*), which provides in Section 3, First (1) for reference to the Adjustment Board of disputes growing out of the interpretation or application of agreements. The National Labor Relations Board (29 U. S. C., Sec. 159) has the task in representation matters to make a determination of the proper constituency of the bargaining unit, and, secondly, to make a finding as to the identity, and the propriety of the selection, of the bargaining representative. Once this has been accomplished, the Board has no jurisdiction to proceed further in these lines. It does not have the power or duty to hear or determine disputes growing out of the interpretation or application of collective agreements as does the Adjustment Board under the Railway Labor Act.

The contents of a collective bargaining contract are not the concern of the Labor Board. The only way the provisions of the contract can become the subject of a Board proceeding is if and when what has been put in or left out becomes the subject of an unfair labor practice. Then the question is not whether or not the subject matter is within the scope of authority of the employer and the labor organization to negotiate. Instead, the question is: has an unfair labor practice been committed?

Exampling, while union authorization elections were still prerequisite to negotiating and putting into effect a union shop clause, the inclusion of such a clause without authority was the proper subject of an unfair labor practice proceeding, because in the absence of

authorization it was a violation of Section 8 (29 U. S. C., Sec. 158), for both employer and labor organization.

Interestingly enough, the Act provides that it is an unfair labor practice for an employer (29 U. S. C., Sec. 8 (a) (b) or labor organization (29 U. S. C., Sec. 8 (b) (3) to refuse to bargain collectively, but it is not an unfair labor practice to bargain too freely, that is, in excess of authority. If either Ford or the Union had refused to bargain about the complained-of clause, its propriety as a subject of collective bargaining could have been tested by an unfair labor practice proceeding. When neither objects, there would appear to be no way to test the propriety of the clause by one aggrieved excepting through the courts of law and equity.

The petitioning union projects that the discrimination struck down by the Sixth Circuit's decision herein could have been made the subject of an unfair labor practice under Section 8 (b) (1) of the Act (29 U. S. C., Sec. 8), which provides:

> "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed them in Section 7. . . . ."

The rights guaranteed by Section 7 are the fundamental rights to organize and bargain collectively, or to refrain from doing so. The theory advanced by the petitioning union necessitates an impossible warping of Section 8 (b) (1). No issue of restraint or coercion of employees in their right to organize and bargain collectively is involved in the present case. The gravamen

L. & N., *supra*, and to the extent that it was in conflict therewith is presumably overruled.

For the most part the provisions ruled upon in the cases cited as being in conflict with the decision herein are provisions in which the particular clause, wise or unwise, did not discriminate among members of the represented group, but set standards that applied to all members of the bargaining unit alike.

It is difficult to refrain from a case by case analysis of the lower court decisions advanced as being in conflict with this decision. To do so here would, however, burden the record unnecessarily. The essence of these arguments amount to asking this Court to overrule Steele v. L. & N., 323 U. S. 192, and the cases following it.

If this Court believe that Steele v. L. & N. should be overruled; then the petitions of Ford and the Union for Writs of Certiorari should be granted. Otherwise, certiorari should be denied.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Pertinent Statutory Provisions
Labor Management Relations Act, 1947
29 U.S.C., Section 151, et seq.

"Section 157—Rights of Employees.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

"Section 158—Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, * * *

"(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. * * *

"Section 159—Representatives and Elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be

the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment: * * *

"Section 160—Prevention of Unfair Labor Practices.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ."